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No. 06-618

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OPPOSING MOTION TO DISMISS OR TO AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR TO AFFIRM

Appellant, Office of Senator Mark Dayton ("Dayton Office"), submits this brief in opposition to the Motion to Dismiss or to Affirm ("Motion") of appellee Brad Hanson ("Hanson") and in support of its Jurisdictional Statement.[1]

[1] At noon on January 3, 2007, Senator Dayton's term of office as a United States Senator will end (see U.S. CONST. Amend. XX, § 1), and the Dayton Office will cease to exist. Shortly thereafter, the Dayton Office will file a suggestion of mootness requesting this Court to vacate the D.C. Circuit's August 18, 2006, Order with respect to the Dayton Office and to remand this action to the D.C. Circuit with directions to vacate the district court's order and to dismiss this action as moot.

ARGUMENT

I. THIS CASE IS PROPERLY BEFORE THIS COURT ON APPEAL OR, ALTERNATIVELY, ON A PETITION FOR A WRIT OF CERTIORARI

A. The Congressional Accountability Act Provides For Direct Appeal From Courts Of Appeals, Not Just From District Courts

Hanson asserts that section 412 of the Congressional Accountability Act ("CAA"), 2 U.S.C. § 1412, "does not contemplate appeals to this Court from the courts of appeals" because in 1988 Congress repealed various statutory provisions that had provided for direct appeal to this Court from courts of appeals. Motion at 6. Appeals to this Court under CAA § 412 are not limited to appeals from district court decisions. Rather, section 412 provides that an appeal may be taken directly to this Court "from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this Act." 2 U.S.C. § 1412(a). Had Congress meant to limit CAA § 412 appeals to those taken from district court decisions, Congress would have so stated. See, *e.g.*, 18 U.S.C. § 700(d)(1) (Under the Flag Protection Act, an "appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).").

B. The Dayton Office's Appeal To This Court Is Timely

Referring to 28 U.S.C. § 2101(a) and (b), Hanson asserts that the Dayton Office's appeal is untimely. Motion at 5 n.5. Subsections (a) and (b), however, are inapplicable to this action

because they apply to direct appeals from three-judge and single-judge district courts, respectively. This action is governed by 28 U.S.C. § 2101(c), which provides that "[a]ny other appeal . . . intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken . . . within ninety days after the entry of such judgment or decree." The D.C. Circuit entered its judgment below on August 18, 2006, and the Dayton Office timely filed its notice of appeal on October 31, 2006.

C. This Action Is Also Properly Before This Court On A Petition For A Writ Of Certiorari

This action is properly reviewable by this Court not only by appeal under 2 U.S.C. § 1412 but also by writ of certiorari pursuant to 28 U.S.C. § 1254. Although repealed, 28 U.S.C. § 2103 provides guidance on this point. When title 28 of the U.S. Code provided for direct appeal to this Court from courts of appeals, it also provided that where such appeals were improvidently taken, the Court should regard the appeal as a petition for a writ of certiorari. 28 U.S.C. § 2103 (repealed 1988). Congress never intended that a party's decision to file a direct appeal precluded the party from filing a petition for a writ of certiorari. Given that this Court may review this action on a writ of certiorari, if this Court determines that appeal pursuant to 2 U.S.C. § 1412 was improvidently taken, the Court should treat the Dayton Office's appeal papers as a petition for a writ of certiorari.

II. SPEECH OR DEBATE CLAUSE IMMUNITY GOVERNS ALL ACTS WITHIN THE LEGISLATIVE SPHERE

Hanson argues that *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), does not provide guidance in this action because the President enjoys absolute immunity with respect to acts within the "outer perimeter" of his official responsibility, while this Court "has never held that Speech or Debate immunity extends to the 'outer perimeter' of legislative acts." Motion at 12. Irrespective of whether the Dayton Office's personnel actions against Hanson are at the outer perimeter or the center of the legislative sphere, they are within the legislative sphere. This Court has repeatedly held that the Speech or Debate Clause covers all acts within the legislative sphere. See, *e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) ("once it is determined that Members are acting within the legitimate legislative sphere, the Speech or Debate Clause is an absolute bar to interference") (internal quotation marks omitted); *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) ("Congressmen and their aides are immune from liability for their actions within the legislative sphere even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.") (internal quotation mark and citation omitted).[2]

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[2] Hanson erroneously asserts that the D.C. Circuit "unanimously decided that the Speech or Debate Clause does not bar suits under the CAA . . . ." Motion at 2-3; see also Motion at 7. The circuit court judges agreed, albeit for varying reasons, that the Speech or Debate Clause is not a jurisdictional bar to Hanson's suit, but at least four of the judges found that the Clause bars CAA suits where the pleadings show that the plaintiff seeks to predicate liability on a legislative act. Jurisdictional Statement App. 20a (opinion for the court in part filed by Randolph, J., joined by Ginsburg, C.J., and Henderson and Tatel, JJ.).

III. THE SCOPE OF THE SPEECH OR DEBATE CLAUSE IS AN ISSUE OF CONSTITUTIONAL INTERPRETATION TO BE DECIDED BY THIS COURT, NOT BY RESORTING TO SELECTIVE PORTIONS OF LEGISLATIVE HISTORY

Quoting comments of individual Senators from legislative history, Hanson states, "Congress considered – and rejected – the notion that judicial enforcement would transgress the Speech or Debate Clause." Motion at 17. As an initial matter, comments of individual Senators do not necessarily reflect Congress's intent. Furthermore, it does not matter whether one, some, or all members of Congress determined that court adjudication of CAA cases would not transgress the Speech or Debate Clause. The scope of the Speech or Debate Clause is an issue of constitutional interpretation, and constitutional interpretation rests with the courts. See *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("Many decisions of this Court . . . have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137 (1803), that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) (alteration in original). Further, even if statements of a few members of Congress expressed Congress's interpretation of the Constitution, this Court would not be bound by that interpretation. This Court has recognized, "Our system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.'" *Nixon*, 418 U.S. at 704 (quoting *Powell v. McCormack*, 395 U.S. 486, 549 (1969)); see also *Gravel v. United States*, 408 U.S. 606, 628 n.17 (1972) ("surely we are not bound by the Government's view of the scope of the [Speech or Debate Clause] privilege").

IV. HANSON'S DUTIES WERE PART OF THE DUE FUNCTIONING OF THE LEGISLATIVE PROCESS

Hanson asserts, "This case is a particularly poor vehicle in which to undertake an exploration of the Speech or Debate Clause" because, he alleges, he was terminated due to his mismanagement of "the Health Care Help Line ['HCHL']" and the HCHL "was not legislative in character" but was merely errand running. Motion at 18. As an initial matter, the relevant issue is not the reason Hanson was terminated but whether his job duties were part of the due functioning of the legislative process. See Jurisdictional Statement at 16.

Also, when a personnel action is taken against an employee whose job duties are part of the due functioning of the legislative process, a court cannot inquire into the motives for those actions.

> The claim of an unworthy purpose does not destroy the privilege. . . . [I]t [is] not consonant with our scheme of government for a court to inquire into the motives of legislators . . . .

Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

Hanson's duties on the HCHL were part of the due functioning of the legislative process.[3] See Jurisdictional Statement at 4. Indeed, in his Winter 2001 Self Evaluation,[4] Hanson acknowledged that his HCHL duties encompassed defining healthcare issues for the legislative agenda, writing legislative briefs, and briefing Senator Dayton. C.A. App. A20. Such duties are part of the due functioning of the legislative process because a "'legislative body cannot legislate wisely, or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)).

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[3] Contrary to Hanson's assertion, the answer does not purport to set forth a full explanation for Hanson's termination. The answer states, "Hanson was terminated because of his poor job performance over an extended period of time" and shows a general lack of commitment on Hanson's part. C.A. App. A35 ¶ 1; see also A35-A36. ("C.A. App __" refers to the pages of the parties' Joint Appendix filed in the Court of Appeals for the District of Columbia Circuit on July 11, 2005, in Case No. 04-5335.)

[4] Hanson quotes *Clinton v. Jones*, 520 U.S. 681 (1997), to support his conclusion that this Court must assume the truth of the factual allegations of the complaint when analyzing the jurisdictional question presented. Motion at 3. A court is not required to accept factual allegations of the complaint as true where, as here, the defendant moved pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss for lack of subject matter jurisdiction and supported its motion with a declaration or other relevant material. See *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 184 (1936) (a court may consider materials outside the pleadings to satisfy itself that it has subject matter jurisdiction of the case).

CONCLUSION

The Court should note probable jurisdiction and should set the case for briefing and oral argument or, alternatively, should treat the papers on which the appeal was taken as a petition for a writ of certiorari and should grant certiorari.

Respectfully submitted.

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